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Anticipatory Repudiation of Contracts

HERBERT R. LIMBURG†

No branch of commercial law presents greater difficulties to the practitioner than the determination of the rights and obligations of the parties where a contract has been repudiated before its time for performance has arrived.

There is no lack of literature upon the subject.¹ The law books are full of cases treating it in its various aspects. But the practitioner is bewildered by the apparent lack of unanimity in decision and comment. Not only do various jurisdictions reach wholly divergent results, but frequently the decisions in the same jurisdiction are difficult, if not impossible, to reconcile; and, when the perplexed student turns to the leading text writers for help, he will find that the fundamental doctrine of anticipatory repudiation, permitting an immediate suit for damages, is assailed by Prof. Williston as illogical and unsound² while Prof. Ballantine takes direct issue with Prof. Williston and is its vigorous defender.³

The difficulties that have arisen in this branch of the law are traceable to various causes. The adoption of a rule of law which would give the injured party immediate relief, which is now generally recognized as desirable, at first met with great opposition. This opposition, added to the somewhat artificial reasoning by which the doctrine was attempted to be justified, resulted in grafting limitations thereon. Some not well considered dicta contained in the earlier English cases, which unfortunately have been reiterated in many of our courts without sufficient analysis, make inaccurate use of such terms as "breach" and "rescission." Of these lapses even our highest courts have been guilty. Finally, there has at times been a failure to distinguish clearly between the *rights* and the *obligations* of the injured party. All of these causes have tended to confusion.

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¹For instance, during the past year there have appeared, among other articles, the second edition of Prof. Williston's work on Sales; "Repudiation of Contracts" by Prof. Williston, a lecture delivered before the Association of the Bar of the City of New York, reprinted N. Y. Law Journal June 20 and 21, 1924; "Anticipatory Breach and the Enforcement of Contractual Duties" by Prof. Ballantine, Michigan Law Review, February 1924; "Measure of Damages for Anticipatory Breach of a Contract of Sale," Columbia Law Review, January 1924; as well as articles by the writer in the New York Law Journals of May 19, 1923, and June 19, 1923.

²Williston on Contracts, vol. III, secs. 1296, 1306, and 1307.

³22 Mich. L. Rev. 329.

Yet no subject can be of greater importance to the attorney and to the merchant than to know definitely and clearly the rights and obligations of a party to a contract, when it has been repudiated by the other party before the time for performance has arrived. Has the injured party the right to an immediate suit? Can he rescind the contract? Does he lose any rights by endeavoring to dissuade the promisor from his unjustified attitude? Must he continue to perform? These are some of the questions with which the practitioner is continually confronted.

Within the confines of this article, it is not feasible to discuss all of the questions that have arisen, nor is it possible to review all of the authorities. It will, however, be attempted to discuss the main principles involved, refer to the leading decisions, and endeavor to formulate some general rules, in the hope that they may be of use to the practitioner.

I. SOME PRELIMINARY CONSIDERATIONS

At the outset, it will, we think, be useful to bear in mind the classification of the covenants of a contract given by Lord Mansfield in *Kingston v. Preston*, cited in *Jones v. Barkley*, viz.⁴

"There are three kinds of covenants; 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."

Only recently, the New York Court of Appeals, after quoting this classification, stated:⁵

"The complexities of modern industrial and commercial transactions have not rendered the classification inaccurate or inadequate."

⁴2 Doug. (Eng.) 684, 689, (1781).

⁵*Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 319 (1919).

In the consideration of the law of anticipatory repudiation, we are more particularly concerned with the second and third of these classifications. Where plaintiff is required to perform a condition precedent, or the promises of the parties are concurrent and dependent, it is familiar law that plaintiff cannot recover without alleging and proving either that he has performed or tendered performance, or that such performance or tender has been excused or waived.⁶

In such a case, "a plaintiff must aver and prove performance, or a tender or waiver of performance, or a fact excusing non-performance."⁷

It is equally well settled in the United States and, we believe, is now equally well settled in Great Britain, that where one party to a contract repudiates the same, the other party by reason of such repudiation is excused from further performance or tender, both because the law does not require any vain thing, and also—in the United States at least—because under settled American doctrine it is the duty of the injured party to minimize damages, and further performance might only tend to enhance the same.

In the further course of this article we refer to the parties to a contract respectively as the repudiator and as the aggrieved (or injured) party, irrespective of whether or not the repudiation has caused damage.

II. RIGHT OF THE INJURED PARTY TO DESIST FROM FURTHER PERFORMANCE

Bearing in mind the principles just enunciated, it is obvious that in the case of an anticipatory repudiation of a contract, which, because of market or other conditions, is unprofitable to the *injured* party, he is excused from further performance and still has a complete *defense* to any action brought against him. If he were sued by the repudiator, the latter would be required to allege performance or tender of performance, or facts excusing the tender of performance. Obviously, where he has wrongfully renounced the contract and has declined to perform it, he is not in a position to so allege or prove. Thus, the position of the injured party is perfectly clear, where he wishes to remain solely on the *defensive*—as e. g., where the repudiation has not damaged him. This situation, however, does not usually arise. Repudiations ordinarily occur where the contract is unfavorable to the *repudiator*, and we, therefore, now come to consider the rights of the injured party to take the *offensive*, by bringing affirmative

⁶See *Delaware Trust Co. v. Calm*, 195 N. Y. 231 (1909); *Rosenthal v. National Folding Box & Paper Co.*, *supra*, n. 5.

⁷*Rosenthal v. (etc.)*, *supra*, at p. 322. See also *Campbell v. Gasoline Oil and Supply Co.*, 125 S. E. (W. Va.) 159 (1924).

action. We must also consider the case where, though the contract is favorable to the repudiator, the injured party has parted with money or other consideration in advance of performance by the repudiator.

III. THE RIGHT TO AN IMMEDIATE ACTION FOR DAMAGES.

Primarily the doctrine of "anticipatory breach" deals with the right of the injured party to bring an action for damages at once; i. e., *before* the time for performance has arrived. It affects solely the *time* of the commencement of the suit—nothing else, as we shall show. The leading case in which this doctrine was first clearly formulated is *Hochster v. De La Tour*⁸ in which Lord Campbell, C. J., stated the problem in the following language:

"On this motion in arrest of judgment the question arises, whether, if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B."

This doctrine has now been firmly established in Great Britain, in our federal courts,⁹ and in most of the state courts. Only in Massachusetts and in Nebraska have the courts declined to recognize it.¹⁰

The doctrine was, however, accepted with hesitation and against much opposition. Much has been written as to the principle upon which it is to be justified. Ordinarily the reasoning by which a well established doctrine is to be justified may be of no great importance. In the case of "anticipatory breach," however, the contrary is the fact, for artificial reasoning has resulted not only in limitations upon the doctrine, but also in the enunciation in many cases of the further doctrine that the injured party is put to an "election"—which is considered hereafter. It is to be observed at the outset that the use of the term "anticipatory breach," by which the principle is usually described, is not strictly accurate. This was always recognized, but

⁸2 El. & Bl. (Eng.) 678 (1853).

⁹*Roehm v. Horst*, 178 U. S. 1 (1899).

¹⁰*Daniels v. Newton*, 114 Mass. 530 (1874); *Carstens v. McDonald*, 38 Neb. 858 (1894); *King v. Waterman*, 55 Neb. 324 (1898).

never put more clearly than in *Bradley v. Newsom Sons & Co.*,¹¹ where Lord Wrenbury said:

"In order to make clear what my view is of the law applicable to such a case I must say something of what is commonly called 'anticipatory breach' of contract. My Lords, the expression is, I think, unfortunate. In *Hochster v. De La Tour*, the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in *Johnstone v. Milling*, but not by either of his colleagues. The words used are, of course, immaterial unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L. J.'s words in *Johnstone v. Milling*, it is 'a wrongful renunciation of the contractual relation into which he has entered.' It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by consensus of the parties, and not by some superior force, that the contract is determined."

The primary difficulty arose through the fact that the only form of action which could be considered appropriate at common law was *assumpsit*. The action of *assumpsit* could not be conceived of without a "breach," and consequently it was necessary to reach the conclusion that the repudiation of the contract resulted in a "breach." Obviously, however, it was not a breach of the *express* terms of the contract.

Leaving aside for a moment the leading case of *Frost v. Knight*,¹² which is responsible for much of the confusion, and which is hereafter considered, it is evident that the English judges were struggling with the theoretical difficulty of regarding the repudiation as a breach. In *Johnstone v. Milling*,¹³ Lord Justice Bowen said:

"It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract, and that it only be-

¹¹(1919) A. C. (Eng.) 16, 53.

¹²L. R. 7 Exch. 111 (1872).

¹³16 Q. B. Div. 460 (1886).

comes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such."

It is difficult to understand how this reasoning can be justified. The breach of a contract must be the act of the party committing the breach. It cannot be the act of the *injured* party. As Prof. Williston very properly states:¹⁴

"This conception is most confusing. A breach of contract properly is simply a breach of a binding promise. Whether a promise is broken depends on the conduct of the promisor. To say that the promisor's promise is broken by the act of the promisee rather than his own act is in the last degree confusing and illogical. No election is necessary to make the breach of a promise in a contract a breach. Subsequent conduct of the injured party may sometimes excuse the wrongdoer from the consequences of his breach, but no conduct of the injured party can on any rational theory cause a breach to occur or prevent a breach from having occurred if a contractor actually breaks his promise.

"The reason for Lord Bowen's statement which I have quoted is, however, not far to seek. The statement is due to a double confusion, first, a confusion of an excuse for not performing a contract with a right of action, and, second, a confusion of cases where the injured party refuses to continue performance on his side without rescinding the contract, with cases where the injured party totally rescinds the contract."

It being clear that the principle of anticipatory breach cannot be justified either upon the theory that the act of repudiation was a breach of one of the *express* terms of the contract, nor upon the theory that it becomes a breach by the injured party "accepting" it as such, Prof. Williston reached the conclusion that there can be no logical justification for the doctrine which gives the right to an immediate action;¹⁵ and the same conclusion was reached by Prof. Terry of Columbia Law School.¹⁶

The writer agrees wholly with Prof. Ballantine that this result does not at all follow from the premises. A contract contains conditions

¹⁴N. Y. L. J., June 20, 1924.

¹⁵Williston on Contracts, vol. III, secs. 1296, 1306.

¹⁶34 Har. L. Rev. 894, 895.

which are *implied* as well as those which are expressed. Nowhere is this more clearly recognized than in Great Britain.¹⁷

In *Frost v. Knight*,¹⁸ Cockburn, C. J., states:

"The promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage."

In *Roehm v. Horst*,¹⁹ Chief Justice Fuller stated:

"The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due."

After repeating the above quotation, the United States Supreme Court in *Central Trust Company v. Chicago Auditorium Association*,²⁰ continued:

"Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor."

There is thus obviously an implied promise not to prevent performance nor to put performance out of one's power and the writer believes that in every contract there is the necessarily implied obligation to continue to be ready and willing to perform the portions of the contract still remaining executory.

There is no reason why a breach of the implied obligations of a contract should not subject the guilty party to an action, and upon this principle the difficulties underlying the recognition of the doctrine would appear to be not insuperable.

Prof. Ballantine goes further. After reaching the conclusion that repudiation is a "present injury," he suggests that even a "threatened injury" may furnish a ground for action *at law* as well as in equity. He admits that this theory is "somewhat novel." Certainly it has not been recognized by the courts; moreover, if applied as Prof. Ballantine suggests, it would lead to much greater difficulties. His suggestion is, in effect, that in the event that the time of per-

¹⁷*Tournier v. National Provincial & Union Bank of England*, (1924), 1 K. B. 461.

¹⁸L. R. 7 Exch. 111 (1872).

¹⁹*Supra*, n. 9, at p. 19.

²⁰240 U. S. 581, 591 (1916).

formance has not arrived at the time of trial, a judgment may be rendered in an action at law, to be paid at a future date.²¹

Courts of law, however, do not enter judgments of this character. The judgment being for money damages, moreover, there is no reason why an immediate judgment should not be entered for the damages ascertained in the suit. In the case of an actual breach of express conditions of a contract, damages are frequently recovered at once even with respect to the executory portion of the contract. For instance, where an employee under contract has been unlawfully discharged, he recovers a money judgment at once, even though the time for performance of this contract has not expired.

Suppose, however, the contract of employment is to commence at a future date and that before such date the employer notified the employee that his service will not be accepted. Should the entry of a money judgment for the employee in such case be postponed until the time of service has expired, whereas if he were discharged after he had begun service he could maintain his action and secure his judgment at once? Surely the difficulty of awarding immediate judgment is not greater in the one case than in the other.

Again, suppose a buyer wrongfully rejects an instalment of merchandise tendered under a contract of sale and that this constitutes a breach of the entire contract. The seller may sue at once to recover damages for the entire contract. Should he have a lesser right if the buyer notifies him before the merchandise has even been tendered that he repudiates the contract and will not accept the merchandise? The writer suggests that the difficulties vanish if we recognize that in an action at law, it is always possible to award a *present money equivalent* for what would be payable at a future date.

It is not necessary, therefore, the writer submits, to resort to any novel theory to sustain the right of action. As a matter of principle and as a matter of justice, it can be abundantly justified by regarding an anticipatory repudiation as a breach of the implied conditions of the contract.

IV. IN WHAT CLASSES OF ACTION DOES THERE EXIST THE RIGHT TO SUE FOR AN ANTICIPATORY REPUDIATION?

Here we arrive at a subject in which logic appears to have gone astray. The hostility to the acceptance of the doctrine has been so great, that the doctrine has been applied with hesitation and caution.

In New York State, as well as in Great Britain, the right to sue has been recognized because of anticipatory repudiation of contracts

²¹22 Mich. L. Rev. 329.

to marry,²² of contracts for personal services,²³ and of contracts for the manufacture or sale of goods.²⁴

In *Kelly v. Security Mutual Life Insurance Company*,²⁵ the court indicated that the right was limited to cases falling within the above classifications. It is at least generally accepted that such an action cannot be brought for an anticipatory repudiation of a *unilateral* contract (such as a promissory note),²⁶ nor for any independent promise in the case of a bilateral contract which has been wholly executed by one side and the repudiation is of the promise to pay money at a future date.²⁷

In the recent case of *General American Tank Car Corporation v. Goree*²⁸ (U. S. Circuit Court of Appeals, 4th Circuit), the court said:

"No right of action arises from the repudiation before maturity of a unilateral contract, nor for repudiation of an independent promise in a bilateral contract. An action cannot be sustained on a promissory note before maturity on the ground that the maker had declared his intention not to pay it. A tenant's repudiation of his lease does not give his landlord an immediate right of action for future rent."

The reasoning by which this distinction is attempted to be sustained is stated in *Nichols v. Scranton Steel Co.*,²⁹ and approved by the Supreme Court in *Roehm v. Horst*.³⁰

In *Roehm v. Horst*, *supra*, the U. S. Supreme Court stated, at page 18:

"We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods."

Prof. Ballantine, Prof. Williston, and the writer as well, find it difficult to justify this distinction. In the case of an executory contract for the sale of goods in instalments a breach by refusal to accept one instalment, amounting to repudiation of the entire contract, gives the seller an immediate right of action not only with

²²*Burtis v. Thompson*, 42 N. Y. 246 (1870); *Frost v. Knight*, L. R. 7 Exch. 111 (1872).

²³*Howard v. Daly*, 61 N. Y. 362 (1875); *Hochester v. De La Tour*, *supra*, n. 8.

²⁴*Windmuller v. Pope*, 107 N. Y. 674 (1887); *Nichols v. Scranton Steel Co.*, 137 N. Y. 471 (1893); *Cort v. Ambergate Railway Co.*, 17 Q. B. 127 (1851).

²⁵186 N. Y. 16, 19 (1906).

²⁶*Roehm v. Horst*, *supra*, n. 9; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 487 (1893); *Benecke v. Haebler*, 38 App. Div. 344 (1899), *Aff'd*, 166 N. Y. 631 (1901).

²⁷*Werner v. Werner*, 169 App. Div. (N. Y.) 9 (1915).

²⁸296 Fed. Rep. 32, 36 (1924).

²⁹*Supra*, n. 26, at p. 487.

³⁰*Supra*, n. 9 at p. 17.

respect to the installment refused but with respect to the executory portion as well. Where the repudiation takes place before merchandise is delivered, the seller can sue forthwith for his damages for the entire contract. Why then should he not have the same right of action if the merchandise has been delivered on credit and the purchaser repudiates the obligation to pay therefor? Why should the seller have an immediate right of action in the former cases and none such in the latter? In all of these cases, the repudiation is primarily of the obligation to pay money—whether it be for goods already delivered, or to be delivered in the future. The seller's concern, where acceptance of merchandise is refused, is primarily to secure the payment contracted to be made therefor. Whether the repudiation takes place before any merchandise has been delivered, or after part has been delivered, or even after all of it has been delivered, it is always a repudiation of the implied terms of the contract.

The courts have suggested that a suit cannot be permitted in the case of an anticipatory repudiation of a promissory note, or of the purchase price of goods sold on credit or of the rent due, because to permit such a suit would "mature" the promissory note, the payment for the goods, or the rent, as the case may be, and in effect, make a new contract. But that is not the legal nor even the actual situation. The plaintiff would not sue for the amount due on the promissory note, for the purchase price of the goods, or for the rent. His action would be based on the breach of the implied terms of the contract hereinbefore indicated. His position would be not essentially different from the discharged employee who recovers in his action for damages for such wrongful discharge the value of his contract, viz., the amount which he would have earned under the contract in the future less what he can earn elsewhere. It has never been suggested that permitting recovery in such an action matures the obligation.

If the result of permitting immediate action be that the defendant may be called upon to pay before the time for payment contracted for, the answer is that this is his own fault. Because of the breach of the implied terms of the contract, he must pay the *present* equivalent of what he would have paid in the future, that being the measure of damages which would be applicable in case of such a breach less the amounts, if any, provable in mitigation thereof.

Prof. Williston urges that thereby the defendant's obligations will be enlarged and that "enlarging the obligation of contracts is perhaps as bad as impairing it."³¹ The writer, however, agrees with Prof.

³¹Williston on Contracts, vol. III, sec. 1321.

Ballantine³² that the *obligations* would not be enlarged, for *damages* recovered are different from promised *performance*.

The limitations upon the doctrine of anticipatory repudiation have resulted, as Learned Hand, D. J., states, in *Equitable Trust Co. v. Western Pacific Railway Co.*³³

"because the eventual victory of the doctrine over vigorous attack has not left it scathless. * * *

"If the doctrine has any limits, they only exclude, and that arbitrarily enough, cases in which at once the promisee has wholly performed, and the promise is only to pay money."

In another class of cases the authorities are wholly at disagreement, viz., whether the right of action exists in the case of the repudiation of a life insurance policy by the company declining to accept premiums tendered. In New Jersey it has been held that an action at law may at once be brought for damages because of the anticipatory repudiation.³⁴

In Massachusetts, where the doctrine of anticipatory repudiation is denied, obviously such an action can not be maintained.³⁵

In New York, however, it has been held that the doctrine does not apply to this class of cases³⁶ and it is suggested that the injured party's remedy is by an action in equity.

Prof. Ballantine very rightly³⁷ insists that the New Jersey and not the New York court has stated the true doctrine. The New Jersey decision also appears to have the approval of the United States Supreme Court.³⁸

Prof. Williston maintains that the right of action should be sustained in those cases because the refusal to accept premiums constitutes an *actual* breach for which there should be an immediate right of action and that the doctrine of *anticipatory* repudiation is not necessarily involved,³⁹ a conclusion which seems unanswerable. However, the practitioner must determine the rights of his clients by the adjudicated cases, and he will necessarily be at a loss to reach a final conclusion in this particular class of cases except in the few jurisdictions where the precise question has already been decided.

³²*Supra*, n. 3 at p. 336.

³³244 Fed. 485, 501 (1917). Aff'd. 250 Fed. 327 (1918).

³⁴O'Neill v. Supreme Council, 70 N. J. L. 410 (1904). To the same effect, Merrick v. Northwestern National Life Insurance Co., 124 Wis. 221 (1905).

³⁵Porter v. Supreme Council, 183 Mass. 326 (1903).

³⁶Langan v. Supreme Council, 174 N. Y. 266 (1903); Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16 (1906).

³⁷*Supra*, n. 3 at p. 335.

³⁸Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, 589 (1915).

³⁹N. Y. L. J., June 20, 1924.

Likewise it has been doubted whether an action will lie upon anticipatory repudiation of a contract to make a testamentary disposition.⁴⁰

To sum up our conclusions as to the classes of cases in which an action for damages because of anticipatory repudiation will lie, in accordance with decisions rendered up to the present time:

(a) The action will *not* lie in the case of unilateral contracts nor for repudiation of an independent promise in the case of a bilateral contract which has been wholly executed on the one side, and where the obligation to be performed by the other party is solely the payment of money.

(b) In some jurisdictions it will not lie in case of repudiation of life insurance policies, while in others such an action will lie.

(c) It is doubtful whether it will lie in the case of a contract to make testamentary disposition.

(d) Except in a few states, the action *will* lie in the case of contracts to marry, for personal services, and for the manufacture and sale of goods.

The recent case of *General American Tank Car Corporation v. Goree*⁴¹ was almost a border line case in which the majority of the court held that the action would lie, and the minority held that to permit it was an undue extension of the doctrine.

V. RESCISSION

It is a general principle of the law of contracts that where there has been a material breach or repudiation of the contract, the aggrieved party has the right of rescission and restitution of that with which he has parted, or its value. This remedy is an alternative to the remedy of recovery of damages.⁴²

It was suggested by Baron Parke in *Ehrensperger v. Anderson*⁴³ that the right of rescission is founded upon the theory that the breach or repudiation is in effect an *offer* to rescind, which is accepted by the aggrieved party when he does rescind. Prof. Williston properly points out⁴⁴ that this suggestion is inaccurate and unscientific, and that in reality the remedy is given by law for reasons of justice and not founded upon an implied offer and acceptance. The same erroneous idea of the basis of the right of rescission underlies *Graves v. White*.⁴⁵

⁴⁰*GaNun v. Palmer*, 202 N. Y. 483, 493 (1911).

⁴¹U. S. Cir. Ct. of App., 6th Cir., 296 Fed. 32 (1924).

⁴²Williston on Contracts, sec. 1455 *et seq.*

⁴³3 Exch. 148, 158 (1848).

⁴⁴N. Y. L. J., June 20, 1924.

⁴⁵7 N. Y. 463 (1882).

Whatever the basis, however, it is well settled, with limitations and exceptions not material to our present discussion, that in the event either of a material breach of the contract or of its repudiation the aggrieved party has the alternative of (1) rescission and recovery of the consideration with which he has parted (or its equivalent); or (2) recovery of damages caused by such breach or repudiation. The former remedy doubtless would be adopted in cases where the contract because of market or other conditions was unfavorable to the aggrieved party, but favorable to the repudiator; the latter would more likely be adopted where the contrary is the case. *

The question of rescission, however, cannot be left without referring to the confusion which has arisen by failing to clearly distinguish between cases (1) where the aggrieved party while himself ceasing to further perform enforces the contractual obligation by suing the wrongdoer, and (2) cases of actual rescission and restitution.

As Prof. Williston points out, the term "rescission" has at times been inaccurately used to express the former class of cases as well as the latter, though the distinction is manifest. It was well put in *Anvil Mining Co. v. Humble*,⁴⁶ in the following language:

"Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. In other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."

And in *Elterman v. Hyman*,⁴⁷ the court said:

"The termination of a contract as to the future by one party owing to the default of the other is a rescission neither *ab initio* nor in any true sense."

*Abandonment of Future Performance by the Aggrieved Party
Does not Constitute Rescission*

Although these principles should be clearly understood, nevertheless the confusion and error seem to persist; as we shall have occasion to point out when we consider the duty of "election."

Where the Sales Act is in force the question has arisen whether notice is a prerequisite to rescission. The statute apparently requires such notice⁴⁸ yet *Henderson Tire & Rubber Co. v. Wilson & Son*⁴⁹ con-

⁴⁶153 U. S. 540, 551 (1893).

⁴⁷192 N. Y. 113, 126 (1908).

⁴⁸N. Y. Pers. Prop. L., sec. 146.

⁴⁹235 N. Y. 489, 500 (1923).

tains a dictum that the commencement of an action would of itself be sufficient notice and that the statutory notice might be dispensed with. This dictum seems open to question. So far as we have been able to ascertain, in no other state where the Sales Act is in force has a similar position been taken, and the practitioner would certainly not be safe in following the dictum contained in the Henderson case, *supra*. Prior to the Sales Act it was held that notice was necessary.⁵⁰

VI. THE RIGHT OR DUTY OF "ELECTION"

The doctrine sometimes asserted that where a contract has been repudiated by the promisor, the promisee is put to an election, has been largely responsible for many of the difficulties in the law of anticipatory repudiation. The origin of this doctrine is to be found in the dictum of Lord Cockburn, C. J., in *Frost v. Knight*,⁵¹ reading as follows:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

It is particularly unfortunate that this statement of the law—which has so often been repeated and so widely misused—was dictum merely, the only issue before the court in that case being whether an action for repudiation of a contract to marry would lie before the date on which the marriage was to take place. The dictum has been repeated in many cases without pains at real analysis, although its

⁵⁰*Scovil v. Wait*, 54 N. Y. 650 (1873); *Borgfeldt v. Wood*, 92 Hun. 260, Aff'd. 154 N. Y. 784 (1898).

⁵¹L. R. 7 Exch. 111 (1872).

correctness has been rejected by almost all American writers. It may, I think, well be considered together with the language of Lord Justice Bowen in *Johnstone v. Milling*,⁵² which, although heretofore quoted, is here repeated:

"It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract, and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such."

All text writers agree that these statements do not represent the law in the United States, and, as we shall show hereafter, they probably no longer represent the law in Great Britain.

It is perfectly clear in the United States that a repudiation of a contract cannot be regarded as *brutum fulmen*. If it were true that the repudiation may be wholly disregarded, it would necessarily follow, that if the promisee, *does* disregard the repudiation he must *continue to perform* and cannot recover without proof of actual performance or tender of performance. But this is distinctly *not* the law. On the contrary, where a contract has been repudiated, it is the duty of the promisee to *desist* from further performance which would enhance damages, for it is his duty to mitigate the damages, and he may continue to perform only if the damages would be greater if he desisted.⁵³

There is in this respect no distinction in the American cases between anticipatory repudiation and repudiation during the term of the contract. (See decisions cited in Williston on Contracts, sec. 1298).

There is, however, involved a still further principle, and that is the principle of waiver. As we have already pointed out, where there has been a repudiation (and quite apart from the duty to mitigate damages) it is not required that the promisee prove actual performance or a tender of performance, but merely a *readiness, ability and willingness* to perform. The repudiation constitutes a waiver of performance or of tender of performance by the aggrieved party.

⁵²16 Q. B. Div. 460 (1886).

⁵³Clark v. Marsiglia, 1 Denio (N. Y.) 317 (1845).

Told that his performance will not be accepted, the law excuses him from making a useless tender.

This doctrine is elementary. It was adopted in Great Britain before the doctrine of anticipatory breach was enunciated in *Hochster v. De La Tour*, *supra*.⁵⁴ It was adopted by the Supreme Court of the United States before the doctrine of anticipatory breach was adopted by that court.⁵⁵ It was adopted in the State of Massachusetts, where the doctrine of anticipatory breach has never been recognized.⁵⁶

Notwithstanding the firm establishment of the doctrine of anticipatory breach in most of our states, the courts have uniformly adhered to the proposition that where there has been a repudiation, the promisee need not prove performance or offer to perform, but merely readiness and ability to perform.⁵⁷

As stated by Prof. Williston:⁵⁸

"Citations need not be multiplied to prove the error of the foregoing statement and the right of the plaintiff to cease performance upon defendant's repudiation and yet sue upon the contract."

Decisions, therefore, such as *Dalrymple v. Scott*,⁵⁹ and *Avery v. Bowden*,⁶⁰ which indicate that unless the injured party elects to treat the repudiation as a breach he cannot recover without proving performance, are obviously not law in the United States. In one of the most recent decisions in the New York Court of Appeals,⁶¹ it was expressly held that where there has been repudiation, the obligation of performance or tender of performance is waived, and that ability, willingness, and readiness to perform alone are required.

This was likewise assumed to be the law in *Lieberman v. Templar Motor Co.*,⁶² and *Sun Printing & Publishing Ass'n. v. Remington Paper & Power Co., Inc.*⁶³ The federal decisions are to the same effect.⁶⁴

⁵⁴See *Ripley v. McClure*, 4 Exch. 345 (1849); *Cort v. Ambergate Railway*, 17 Q. B. 127 (1851).

⁵⁵*Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264 (1886).

⁵⁶*Williams v. Patrick*, 177 Mass. 160 (1900).

⁵⁷*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286, (1877); *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477 (1914); *Roller v. George H. Leonard & Co.*, 229 Fed. 607 (1915); Williston on Contracts, vol. III, sec. 1303, citing numerous cases.

⁵⁸*Supra*.

⁵⁹19 Ont. App. 477 (1891).

⁶⁰5 El. & Bl. (Eng.) 714 (1855).

⁶¹*Strasbourger v. Leerburger*, 233 N. Y. 55, 60 (1922).

⁶²236 N. Y. 139, 146 (1923).

⁶³235 N. Y. 338, 347 (1923).

⁶⁴*Lamborn v. Log Cabin Products Co.*, 291 Fed. 435 (1923); *Lagerloef Trading Co., Inc. v. American Paper Products Co.*, 291 Fed. 947 (1923); *Colonial Ice Cream Co. v. InterOcean Mercantile Co.*, 296 Fed. 316 (1924); *Armour & Co. v. Sherburne*, 300 Fed. 81 (1924).

With this preliminary discussion then, let us consider to what election the promisee is put when the contract is repudiated by the promisor before its time for performance. An election can be required only between two *inconsistent* courses. If the promisee wishes to rescind the contract and recover back the consideration that he has paid or given (this is technical rescission as heretofore pointed out), he clearly would be called upon to act, as this remedy is inconsistent with a suit for damages.⁶⁵ But the term "election" has not ordinarily been used by the courts to distinguish between rescinding and not rescinding. It has been employed in the dicta quoted, and in the authorities in which such dicta are repeated or referred to, as apparently indicating something quite different, viz., an election between suing upon the contract at once because of the anticipatory breach, and "keeping it alive," as it is sometimes called. This has led to the further erroneous suggestion in some of the cases that if the contract be "kept alive," i. e., that if a suit to recover damages for anticipatory breach be *not* brought promptly, then the contract continues for all purposes; that the repudiation is in such case "*brutum fulmen*" (in the language of Lord Justice Bowen in *Johnstone v. Milling, supra*) the necessary consequence of which is that the aggrieved party must perform or tender performance, and otherwise cannot recover.

This assuredly is not the law, as we have already pointed out, it being now firmly established that in case of repudiation of a contract by a defendant, the plaintiff may cease performance and none the less sue upon the contract. If the aggrieved party were put to an election between suing because of an anticipatory breach or suing because of breach at the time of performance, it would necessarily seem to follow that the lapse of a reasonable time without beginning suit would constitute an election. Nevertheless, the right to sue for an "anticipatory breach" has been frequently recognized after the lapse of a substantial length of time.⁶⁶

There are, it is true, some dicta that election "must be made within a reasonable time."⁶⁷ But these dicta are palpably wrong. They proceed upon the erroneous theory that repudiation is in the nature of an offer which requires acceptance and which lapses in a reasonable time, instead of holding that a repudiation continues until retracted.

⁶⁵See also Sales Act, N. Y. Pers. Prop. L., sec. 146.

⁶⁶*Roehm v. Horst, supra*, n. 9—7 months; *Skeele Coal Co. v. Arnold*, 200 Fed. 393 (1912), petition for writ of certiorari denied, 226 U. S. 612—1 month; *Roller v. George H. Leonard & Co.*, 229 Fed. 607, 616 (1915)—3 years.

⁶⁷*Louisville Packing Co. v. Crain*, 141 Ky. 379 (1910); *Paducah Cooperage Co. v. Arkansas Stave Co.*, 193 Ky. 774 (1922); *Dunkirk Colliery Co. v. Lever*, 41 L. T. 633 (1879), Aff'd. in the House of Lords without opinion, 43 L. T. 706 (1808).

In no case, so far as the writer is aware, has it actually been *held* that the promisor *has* exceeded the time allowed him for "election." Nor is there really any inconsistency between suing immediately when a contract has been repudiated, or commencing suit only after the contract time for performance has expired. Consequently there can be no occasion to elect.

The only effect of delay is that in the meantime the promisor may (unless some principle of estoppel intervenes) retract his repudiation.⁶⁸ The only possible inconsistent courses between which election may be involved, are (1) technical rescission of the contract, and (2) suing for damages, i. e., upon the contract whether prior or subsequent to the contract time for performance. "Keeping the contract alive" in effect is little more than refusing to agree to its cancellation or rescission. So far as the seller's remedy is concerned, the contract is just as alive if the suit be brought at once because of an anticipatory repudiation as if suit be brought thereafter because of non-acceptance at the time of delivery. Probably the best statement of the law on this subject is to be found in the recent opinion of Baker, J., in *Lagerloef Trading Company, Inc. v. American Paper Products Co.*⁶⁹ in which the following language was used:

"What burden and risk of 'election' should a promisor's anticipatory repudiation of his fair and binding promise cast upon the promisee? The promisor's proposal to cancel the promisee's obligations would, if accepted, be a good consideration for the promisee's release of the promisor's obligations. But it takes two to make the new bargain of mutual release. And if the promisor's proposal of cancellation is made when no benefit could possibly accrue to any one except himself, when by reason of his power in the business world to award future prizes or inflict future pains he expects or hopes to force the promisee to stand the loss, the only 'election' which the law should permit to be cast upon the promisee is to say yes or no to the promisor's proposal of mutual releases. If the promisee says yes, the matter is at an end. If he says no (meaning thereby that he declines to submit to the arbitrary and unjust demand), he should not be held to be digging pitfalls for himself and building isles of safety for the repudiator. And he is so betrayed, if the law makes more of his 'no' than this: 'I refuse to accept your proposal of mutual releases. I am able and willing to go ahead with our arrangements as

⁶⁸*Peurrung v. Carter-Crume Co.*, 110 Fed. 107 (1899); *United Press Ass'n. v. National Newspaper Ass'n.*, 237 Fed. 547 (1916); *Rederiaktiebolaget Amie v. Universal Transp. Co.*, 250 Fed. 400 (1918); 13 C. J. 657; 23 R. C. L. 1410 ("Sales," sec. 234).

⁶⁹291 Fed. (C. C. A., 7th Cir.) 947 (1923), petition for certiorari denied 263 U. S. 706 (1923).

originally agreed upon, except that it may be necessary to count out the loss of time occasioned by your recalcitrance. This is the only "election" or notice of my intention to which you are entitled. It is no concern of yours whether I sue you today on "anticipatory breach" or on any other day down to the due date. If I do not sue you on "anticipatory breach," you may take my action in that regard as a continuing invitation to you to repent. Indeed I may from time to time down to the due date repeatedly urge you to repentance, but only in the interest of your morality, not to increase your immorality by permitting you to claim immunity through my courtesy and fair dealing. I am giving you the opportunity to repent, and in that sense I am "keeping the contract alive for your benefit," but in no other sense. If despite your recalcitrance I do things looking toward performance, that is only to show my willingness and ability, for I realize that the law will not permit me to increase the damages by doing unnecessary things. And, finally, if by the due date you have not repented, I shall then and thereafter count on what had stood as your continuous anticipatory repudiation as having ripened into a completed breach.

"We say that, in our judgment, the law should so pronounce, because the law should not be regarded as crystalized strata of a dead past, but as a living force that pulses in response to preponderant convictions of morality. Commercial law should reflect commercial morality * * * We say further that, in our judgment, the law has already so pronounced."

This citation has the express approval of Prof. Williston.⁷⁰

From this review of the principles of the law, it would seem to follow that, inasmuch as the aggrieved party need not after repudiation perform but need merely be ready, willing, and able to perform, he does not lose any rights by urging the repudiator to withdraw his repudiation. It would be unfortunate were the law otherwise.

The question usually arises in contracts of sale. If it were held that the seller cannot make any attempt to keep his customer, by urging him to withdraw his repudiation, the seller would in every case be compelled to rush to court whenever there has been a repudiation by the buyer. But the law does not require this. It should favor all efforts by the aggrieved party to secure withdrawal of the repudiation and performance of the contract. It should not penalize such efforts. This was directly held in *Lagerloef Trading Company, Inc. v. Amerian Paper Products Co.*, *supra*. Numerous other cases illustrate the same proposition.⁷¹

⁷⁰Williston on Sales (2d ed.), vol. II, p. 1451.

⁷¹*Alpena Portland Cement Co. v. Backus*, 156 Fed. 944 (1907); *Donati v. Cleveland Grain Co.*, 221 Fed. 168 (1915); *Tri-Bullion Smelting Co. v. Jacobsen*, 233 Fed. 646 (1916); *United Press Ass'n. v. National Newspaper Ass'n.* 237

The same view was forcefully and well expressed by Bijur, J., in *Hadfield v. Colter*.⁷²

"A rule that the honest promisee must at his peril refrain from endeavors to persuade the defaulting promisor to live up to his agreement and thus perform what the promisee has a right to demand, or that during the period of these meritorious efforts the promisee must faithfully perform the agreement which the promisor has repudiated, would place a premium upon faithlessness and a penalty upon honorable business dealings. It would enable the dishonorable contractor to set a trap for him who observes his obligations."

It is true that this case was reversed in the Appellate Division⁷³ largely upon the facts but the reversal does not detract at all from the above statement of the law by Justice Bijur.

The British cases seem now definitely to have abandoned the rule of *Frost v. Knight*, *supra*, and *Johnstone v. Milling Co.*, *supra*. In *Braithwaite v. Foreign Hardwood Co.*⁷⁴ the court held expressly that even a partial or attempted performance which was defective could not prejudice the aggrieved party so long as there existed readiness and ability on his part to perform.⁷⁵ In the *Braithwaite* case the seller had contracted to deliver 100 tons of Honduras rosewood to the buyer in England. After anticipatory repudiation by the buyer the first shipment of 63 tons arrived, of which 17 were defective in quality, which would otherwise have justified rejection. But the buyer adhered to his repudiation when the bill of lading was tendered to him, and only afterwards discovered the defects. His contentions upon trial appear sufficiently from the following extract from the opinion of the Master of the Rolls:⁷⁶

"They say that upon the repudiation of the contract the plaintiff had two courses open to him. In the first place, he might have accepted the repudiation as absolving him as well as the defendants from the performance of the contract and as giving him a right once for all to damages for a breach of the entire contract, or, in the second place, the plaintiff might have adhered to the contract and from time to time have gone into the market when the installments of rosewood arrived and the defendants refused to accept them, thus keeping open

Fed. 547 (1916); *Wall Grocer Co. v. Jobbers' Overall Co.*, 264 Fed. 71, 73; (1920), *Krauter v. Simonin*, 274 Fed. 791, 793 (1921); *Canda v. Wick*, 100 N. Y. 127 (1885); *Riendeau v. Bullock*, 147 N. Y. 269, 275 (1895); *Brown v. Muller*, 7 Exch. 319 (1872).

⁷²103 Misc. (N. Y.) 474, 486 (1918).

⁷³188 App. Div. 563 (1919).

⁷⁴2 K. B. 543; reported below, 92 L. T. 637 (1905).

⁷⁵This likewise had been the conclusion of the Circuit Court of Appeals in *Lagerloef v. American Paper Products Co.*, *supra*, n. 69.

⁷⁶*Supra*, p. 550; see also *Habeler v. Rogers*, 131 Fed. 43 (1904).

the obligation on the plaintiff's part to be ready and willing to perform the conditions of the contract to be performed by him. The defendants, the buyers, say that the plaintiff took the second course; in other words, that instead of accepting the defendants' repudiation of the contract he took it upon himself to keep the contract alive and that he must therefore show that he was ready and willing to carry out his part of the contract when the time came to tender each installment. They further say that the first installment was not such as they were bound to accept, because a considerable percentage of it did not conform to the standard of quality prescribed by the contract, and they pray in aid the observation of Kennedy, J., that if it had been necessary to tender that consignment formally the buyers, that is, the defendants, would have been entitled to reject the whole of it. The defendants further contend that if the learned judge was right in his view, the buyers would have been entitled to refuse to accept the installment on the ground of difference of quality, that installment must, for the purpose of assessing the damages, be wholly wiped out, because the plaintiff, not being able to show that he was himself able and ready and willing to fulfill his part of the contract according to its terms, could be entitled to no damages in respect of that installment; and that the question of damages was thus narrowed down to the damages in respect of the second installment.

"At first sight this contention of the defendants seems to be a formidable one, but upon a more careful analysis I think it is untenable. We must for this purpose deal with the contract upon the footing that it was kept alive. The obligation upon the plaintiff was to deliver the rosewood by installments. Where such an obligation exists, as each installment is tendered under the contract, the buyer must be ready and willing to perform the contract as well as the seller, and if he is not willing to perform it he may, by his conduct or by express words, absolve the seller from his obligation. In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first installment; but the defendant again wrote, refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract, which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might

have rejected the installment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleading, it would have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any installment if tendered to them. The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defense which they previously elected not to make. We must in such a case look to see whether at the time of each alleged breach each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract."

A recent decision by the House of Lords of Great Britain went even further.⁷⁷ The pertinent facts so far as material may be stated as follows: The sellers were tea growers in India. They contracted to ship and sell tea to buyers, delivery to be made in a bonded warehouse in London. The sellers actually consigned shipments to London, but, owing to congestion at that port, the ships were diverted by the shipping controller to various ports in England and Scotland, where further delays were caused by congestion in those ports. The tea was put in warehouses at the respective ports to which the ships had been diverted. Negotiations took place by which the sellers sought to induce the buyer to accept delivery at such ports, but the buyer finally repudiated the contracts, claiming that more than a reasonable time for delivery had elapsed. The contract did not specify time for delivery. Under provisions of the contract, the cases were submitted to an arbitrator, who found that a reasonable time had *not* elapsed at the time of the repudiation; that, in consequence, repudiation was unlawful, and the sellers entitled to recover damages.

On appeal from the arbitrator's decision, Judge McCardie decided for the buyer. The Court of Appeals reversed the decision and upheld the arbitrator's award. Appeal was then taken to the House of Lords, where two opinions were written, the first by Lord Atkinson, the second by Lord Sumner. *All* the members of the court agreed that *performance* or *tender* on the part of a seller is waived by a buyer's anticipatory repudiation, provided *at the time* of such repudiation the seller is ready, able, and willing to perform. But the majority of the court went even further and held—as had also been held by the Court

⁷⁷British & Beningtons Lim. v. North Western Cachar Tea Co. (1923) A. C. 48. This decision deserves more extended study than the scant reference to it in Williston on Sales (2d ed.), vol. II, pp. 1442, 1454.

of Appeals in that case—that not only performance or tender, but even the existence *at the time of repudiation* of readiness, ability, and willingness were waived by the repudiation; in other words, that a seller who had previously become disabled to perform could nevertheless recover if the buyer repudiated. Lord Atkinson stated the law as follows:⁷⁸

“* * * That when a buyer before breach of a contract for the sale of goods repudiates it * * * seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing *at the date of repudiation* to deliver the goods.”

In support of this conclusion, Lord Atkinson referred to the opinion of Lord Mansfield in *Jones v. Barkley*,⁷⁹ reading:

“Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shewn to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs.”

He also referred to *Hotham v. East India Co.*⁸⁰ and *Cort v. Ambergate Railway Co.*,⁸¹ the *Braithwaite* case, and finally *In re Bayley-Worthington and Cohen's Contract*,⁸² in which Parker, J., said:

“In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain.”

Lord Sumner disagreed with so much of Lord Atkinson's opinion as determined that a repudiating buyer may not defend upon the ground that *at the time of repudiation* sellers were not ready and able to perform. His opinion states:⁸³

“I do not think that the case, as reported (the *Braithwaite* case) lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has therefore no other opportunity of defense either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defenses in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial.

⁷⁸*Supra*, p. 63.

⁷⁹*Supra*, n. 4, p. 694.

⁸⁰1 T. R. 638 (1787).

⁸¹17 Q. B. 127, 143, 144 (1851).

⁸²1 Ch. 648, 664 (1909).

⁸³*Supra*, n. 77, p. 71; italics are the writer's.

What he says is, of course, very material upon the question whether he means to repudiate at all and, if so, how far and how much, and on the question in what respects he waives the performance of conditions *still performable in futuro* or dispenses the opposite party from performing in his own obligations *any further*, but I do not see how the fact that the buyers have wrongfully said 'we treat this contract as being at an end, owing to your unreasonable delay in the performance of it' obliges them, when that reason fails, to pay in full, if *at the very time of this repudiation*, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's case* says nothing which affects the regular consequences when it appears that *at the time of breach* the plaintiff is already completely disabled from doing his part at all."

Lord Sumner, conceded that neither performance nor tender was required of the sellers, but merely ability and readiness to perform. He stated that it did not appear in the instant case that sellers could *not* have forwarded the tea to London; therefore, it did not appear that they were *unable* to perform, and, in the absence of *proof* of inability to perform, (the burden of such proof being upon the buyer) the buyer had no defense. Lord Buckmaster agreed with Lord Sumner's opinion. All five judges concurred in the judgment for the sellers. It is not entirely clear from reading the case as reported whether the remaining judges, Lord Wrenbury and Lord Carson, agreed with Lord Atkinson's opinion or only with the result. The former would seem to be the fact, for Lord Atkinson's opinion is the first printed, indicating that it is the prevailing opinion of the court, and, according to the headnote, it is the decision of the case, the headnote reading in part as follows:

"The buyers, having wrongfully repudiated the contracts, the sellers were not bound to prove that they were ready and willing at the date of the repudiation to deliver the teas in London, and that the awards ought to stand."

It may be noted that the authorities relied upon by Lord Atkinson when carefully examined do not fully support the proposition for which they are cited. They all assume that the obligation to be ready, able, and willing to perform existed up to the time of the repudiation. The *future* ability and readiness to perform were held to be waived. If the decision in the *British & Beningtons, Lim.*, case had been so limited, no criticism thereof could, I think, be well taken. It would agree with what we have heretofore pointed out to be the law in this jurisdiction. It seems unreasonable, however, to permit a plaintiff to recover by reason of defendant's repudiation, when the plaintiff had already disabled himself from performing or expressed

an unwillingness to perform at the time of or prior to defendant's repudiation. It is not likely, therefore, that the *British & Beningtons, Lim.*, case will be followed to the full extent of the statement in the headnote and in Lord Atkinson's opinion. It will presumably be followed in so far as it held that there may be recovery without proof of performance or tender, if, at the time of repudiation, there existed the readiness, ability, and willingness to perform.

It seems rather obvious that *after* repudiation the aggrieved party must not *continue* to be ready and able to perform. Suppose a buyer, who has contracted to take the complete output of the seller's plant repudiates the contract, the seller need not keep his plant idle. He may sell to others. By selling to others he, of course, disables himself from *further* performing the contract, but no one, I think, would say that he is under any compulsion not to use his plant because of the repudiation. If a ship be chartered to go to a distant point and take a cargo and this contract be repudiated, it is not necessary to send the ship there for that cargo, but the ship may go elsewhere. In other words, the readiness, willingness and ability to perform must not continue *after* repudiation. It is sufficient that at the time of the breach, the aggrieved party was, and *but for the breach*, would have continued to be ready, willing, and able to continue performance.

The questions discussed herein and more particularly elaborated in the opinions in *Lagerloef Trading Company, Inc. v. American Paper Products Co.*, *supra*, and *Braithwaite v. Foreign Hardwood Co.*, *supra*, were also presented to the New York Court of Appeals in *Stehli Silks Corporation v. Kleinberg*,⁸⁴ which, when unanimously affirming the decision below, apparently took the same view, though no opinion was written.

There remain to be considered the principal cases usually cited as contrary to the propositions herein enunciated.⁸⁵

The *Cleveland Rolling Mill* case⁸⁶ was decided before the adoption by the U. S. Supreme Court of the doctrine of anticipatory repudiation. However, a careful examination of the record and briefs in that case indicates that it is not at all at variance with anything herein stated. The action was brought on a declaration⁸⁷ claiming

⁸⁴236 N. Y. 631 (1923).

⁸⁵*Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255 (1887); *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83 (1893); *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120 (1917); *Hadfield v. Colter*, 188 App. Div. (N. Y.) 563 (1919).

⁸⁶*Supra*.

⁸⁷Record, pp. 6-10.

full performance and non-acceptance by the buyer when delivery was made. There was no question of anticipatory repudiation involved. While thereafter a second count was added,⁸⁸ based upon anticipatory repudiation, it was abandoned upon trial, the plaintiff relying for recovery and succeeding upon the theory of full performance.⁸⁹

Likewise in his briefs before the U. S. Supreme Court, the *seller* made no mention of the theory of anticipatory repudiation but stood squarely upon the proposition that there had been *full performance*. The *buyer* briefly mentioned it in his brief,⁹⁰ contending, however, that if there were an "anticipatory breach," the *seller prior to that* time had broken the contract and was not able, ready and willing to perform. The opinion of the Supreme Court sustains these contentions upon the facts, and must be read in the light of those facts.

In *Foss-Schneider Brewing Co. v. Bullock*,⁹¹ plaintiff did not sue because of *anticipatory* repudiation but to recover because of full performance and an unwarrantable refusal of plaintiff's tender. Judge Taft permitted recovery on the contract price as for goods sold and delivered. *Defendant*, however, asserted that it had repudiated the contract *prior to* the breach sued upon; that the cause of action dated from the repudiation and not from the refusal to accept, and consequently was barred by the statute of limitations. This contention was overruled by Judge Taft, just as the similar contention was overruled by the New York Court of Appeals in *GaNun v. Palmer*,⁹² The language of Judge Taft that "if he (the aggrieved party) elects to consider the contract still in force, he cannot recover thereafter without performing all the conditions of the contract by him to be performed" was pure *dictum*.

The dicta in the *Cleveland Rolling Mill* and *Foss-Schneider Brewing Co.* cases, *supra*, are clearly overruled by the later leading case of *Roehm v. Horst*,⁹³ in which the Supreme Court of the United States first recognized the doctrine of anticipatory repudiation. In that case the original repudiation was mailed by the buyer to the seller on June 27, 1896. The final repudiation was received by the seller on October 24, 1896. The report of the case in the lower court⁹⁴ shows that the action was brought on January 27, 1898. At no time

⁸⁸Record, pp. 15-18.

⁸⁹See opinion of Blodgett, J., 17 Fed. 426 (1883).

⁹⁰Pages 38-41.

⁹¹*Supra*, n. 85; likewise decided before adoption of the doctrine of anticipatory repudiation by the U. S. Supreme Court in *Roehm v. Horst*, *supra*, n. 9 (1899).

⁹²*Supra*, n. 40.

⁹³*Supra*, n. 9.

⁹⁴84 Fed. 565, 568.

during the controversy did the seller "elect to treat the repudiation of the buyer as a breach" until he brought the action. The institution of the action was the only act or word of election. Consequently, if there existed a duty of election, it was not exercised for a period of seven months from the date of the first repudiation, and of three months from the date of the last repudiation.

In enunciating the doctrine of anticipatory repudiation and applying it in that case, the U. S. Supreme Court, therefore, did not interpret it either as requiring an immediate "election" or in fact as requiring any election other than the institution of the suit. Moreover, the facts stated on page 4 of the opinion show clearly that the Court held that urging a retraction of the repudiation clearly did not constitute a waiver of the right to sue because of the repudiation, if not retracted.

In *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*,⁹⁵ there was a statement by Judge Cardozo to the effect that the plaintiff did not rescind for anticipatory breach, but chose to keep the contract alive and that the contract thus preserved remained alive as much for the benefit of the buyer as for the benefit of the seller. In this case, Judge Cardozo fell into the error in the use of the word "rescission" which we have already pointed out. His opinion apparently held⁹⁶ that notice of rescission was necessary under the Sales Law, section 146, whereas the case did not involve a technical rescission at all to which the section of the Sales Act in question exclusively refers. This error was promptly thereafter corrected by the Court of Appeals.⁹⁷

The opinion in the *Henderson Tire & Rubber Co.* case⁹⁸ also points out:

"The defendants had refused to give further specifications or accept further deliveries. They refused to further perform, and this gave the plaintiff the right to pursue one of three remedies: (a) Treat the contract as wholly rescinded and recover upon a *quantum meruit* so far as it had performed; (b) keep the contract alive for the benefit of both parties and at the end of the time specified for performance sue and recover under it; (c) treat the refusal on the part of the defendants as an abandonment of the contract and sue for the profits which might have been made had the contract been performed. In the latter case the contract is continued for

⁹⁵221 N. Y. 120 (1917).

⁹⁶P. 125.

⁹⁷*Estes v. Curtiss Aeroplane & Motor Corporation*, 232 N. Y. 572 (1922); *Heller & Brother v. Continental Mills*, 233 N. Y. 641 (1922); *Henderson Tire & Rubber Co. v. Wilson & Son*, 235 N. Y. 489 (1923).

⁹⁸*Supra*, at p. 499.

that purpose, and that is precisely what the plaintiff in this case elected to do so far as the second cause of action is alleged."

The actual decision in *Rubber Trading Co. v. Manhattan Rubber Manufacturing Co.*, *supra*, is, however, quite correct, for in that case there was an *unwillingness* to perform. The alleged "*willingness*" was to perform only upon conditions additional to and unwarranted by the contract. There was, therefore, an unwillingness to perform *upon the contract terms*. As such unwillingness existed, obviously plaintiff could not recover. The Court of Appeals thereafter explained its decision in the *Rubber Trading Co.* case upon this express ground.⁹⁹

In *Hadfield v. Colter*,¹⁰⁰ the decision of Justice Bijur¹⁰¹ was reversed largely upon the facts. In that case likewise the court found an unwillingness to perform, viz., an unwillingness to perform *upon the contract conditions*. Moreover, in that case, *after* the repudiation there were further deliveries and *acceptance thereof*. Thus the repudiation was clearly waived. In *Harris v. Einhorn*,¹⁰² Judge Wagner clearly pointed out this distinction.

There remains to be considered a recent decision¹⁰³ in which Judge Martin said:

"In this case the contract was not rescinded by the seller. The seller elected to consider the contract in existence. *Tender was, therefore, necessary. There was no proof of tender of the thirty-four pieces, and it is clear they were not ready for delivery within the contract time.*"

If this opinion is to be construed as holding that in a suit based upon anticipatory repudiation, plaintiff was required to prove tender (as distinguished from readiness, ability, and willingness to perform) it is directly contrary to the current of authority.

VII. RETRACTION OF REPUDIATION

After commencement of an action based upon anticipatory repudiation, there can be no effective retraction of such repudiation. The rights of the parties are definitely fixed. Before suit, however, such repudiation may be retracted where no principle of estoppel inter-

⁹⁹*Sun Printing & Publishing Ass'n. v. Remington Paper & Power Co.*, 235 N. Y. 338, 347 (1923).

¹⁰⁰188 App. Div. (N. Y.) 563 (1919).

¹⁰¹*Supra*, n. 72.

¹⁰²114 Misc. 387, 391 (1921).

¹⁰³*Blumenthal v. Gallert*, 209 App. Div. (N. Y.) 602, 605 (1924); italics are the writer's.

venes.¹⁰⁴ It is obvious that by reason of some change of position on the part of the aggrieved party, in reliance upon the repudiation, or of changed conditions, an estoppel may arise against any claim that the *locus penitentie* was still in existence.

The court would in a close case presumably favor the aggrieved party, for, as stated by Fuller, C. J., in *Roehm v. Horst*¹⁰⁵

"Why should a *locus penitentie* be awarded to the party whose wrongful action has placed the other at such a disadvantage?"

VIII. WHAT CONSTITUTES ANTICIPATORY REPUDIATION?

It is generally laid down that no cause of action arises unless repudiation is positive, unequivocal, and absolute.¹⁰⁶

In *Vogt Bros. Mfg. Co. v. Sloss-Sheffield Steel & Iron Co.*,¹⁰⁷ the court went as far as to say:

"A purchaser who, without any legal excuse, intends definitely and finally to repudiate a contract, must make that intention clear beyond doubt or confusion."

Commenting upon the requirement that a repudiation must be positive and unequivocal, Prof. Williston recently wrote:¹⁰⁸

"It is stated in the decisions that in order to give rise to an anticipatory breach of contract the defendant's refusal to perform must have been *positive and unconditional*. In *Dingley v. Oler* (117 U. S. 490) the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote: 'We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered it to other parties here (fifty cents a ton), or give you ice when the market

¹⁰⁴*Lagerloef Trading Co. v. American Paper Products Co.*, 291 Fed. 947 (1923). See also *Peurrung v. Carter-Crume Co.*, 110 Fed. 107 (1899); *United Press Association v. National Newspaper Association*, 237 Fed. 547 (1916); *Rederiaktiebolaget Amie v. Universal Transp. Co.*, 250 Fed. (C. C. A., 2d Cir., S. D. N. Y.) 400, (1918); *Paducah Cooperage Co. v. Arkansas Stave Co.*, 193 Ky. 774, (1922); *Rayburn v. Comstock*, 80 Mich. 448 (1890); *Bernstein v. Meech*, 130 N. Y. 354 (1894); *Zuck v. McClure*, 98 Pa. 541 (1881); *Gentry v. Margoliuss & Co.*, 110 Tenn. 669 (1903); *Nilson v. Morse*, 52 Wis. 240 (1881); 13 C. J. 657, sec. 732; 23 R. C. L. 1410, sub-tit. "Sales," sec. 234.

¹⁰⁵*Supra*, n. 9.

¹⁰⁶*Petoskey Portland Cement Co. v. E. V. Benjamin Co., Inc.*, (C. C. A., 6th Cir.) 296 Fed. 9 (1924); *Vogt Bros. Mfg. Co. v. Sloss-Sheffield Steel & Iron Co.* (C. C. A., 6th Cir.) 297 Fed. 54, 57 (1924); *J. L. Metz Furniture Co., Inc., v. Thane Lumber Co.* (C. C. A., 8th Cir.) 298 Fed. 91, 92 (1924). See also *Dingley v. Oler*, 117 U. S. 490, 496, and *Smoots Case*, 15 Wall. (U. S.) 36 (1872) (both decided before the U. S. Supreme Court adopted the doctrine of anticipatory repudiation); *Edwards v. Proctor*, 173 N. C. 41 (1917); *Wells v. Hartford Manila Co.*, 76 Conn. 27 (1903).

¹⁰⁷*Supra*, at p. 57.

¹⁰⁸*Supra*, n. 14.

reaches that point.' At the time when this letter was written ice was worth \$5 a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one-tenth of the price for which it is selling in July, and yet the court held the letter constituted no anticipatory breach of contract because the refusal was not absolute, but 'accompanied with the expression of an alternative intention' to ship the ice 'if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them.' Surely a man must be well advised to know when he has the right to regard his contracts as broken by anticipation. So a mere threat to abandon a contract will not amount to a breach, (*Oliver v. Loydon*, 163 Cal. 124; *Listman Mill Co. v. Dufresne*, 111 Me. 104), and it has even been said that 'a mere assertion that the party will be unable to or will refuse to perform his contract is not sufficient.' (Benjamin on Sales [quoted in *Smoot's case*, 15 Wall. 36.]) I may remark in passing that a party to a contract is under no obligation in reply to inquiries to state his intentions concerning the performance of his future duties under a contract. (*Ripley v. McClure*, 4 Exch. 345).

"In *Central Trust Co. v. Chicago Auditorium Association* (240 U. S. 581, 36 Sup. Ct. Rep. 412, 60 L. Ed. 811, L. R. A., 1917 B, 580) in discussing the question whether on bankruptcy of a party to a bilateral contract before a breach the solvent party has a provable claim, the Supreme Court of the United States held that he had, and unquestionably any other decision would have been unfortunate."

After questioning the reasoning (not the decision) of the U. S. Supreme Court in *Central Trust Company v. Chicago Auditorium Association*, *supra*, Prof. Williston continues:¹⁰⁹

"In voluntary bankruptcy the debtor himself petitions and the adjudication follows immediately after. It is easier to regard such a voluntary petition as a repudiation than to regard the filing by a creditor of a petition in bankruptcy as such a repudiation. It is certainly difficult to see how a creditor can repudiate the debtor's contract for him. Moreover, if filing the petition is a repudiation, on the theory that the debtor must at his peril keep his credit good, it seems equally a repudiation and breach of contract whether the petition is ultimately sustained and followed by an adjudication in bankruptcy or not, and any manifestation of insolvency should have the same consequence. But the contrary has been held." (A decree of insolvency against a corporation was held no anticipatory breach of its contract in *Barthen v. Lodi Corp'n*, N. J. L. 119 Atl. 189.)

¹⁰⁹N. Y. L. J., June 21, 1924.

Prof. Williston's difficulties arise largely from his rejection of the doctrine of anticipatory repudiation as illogical and unsound. That doctrine once accepted, upon the principles laid down in *Roehm v. Horst* and *Central Trust Co. v. Chicago Auditorium Association*, *supra*, and heretofore discussed, the difficulties disappear. From the principles laid down in these cases, however, it would seem to follow necessarily that insolvency even without bankruptcy does constitute an anticipatory repudiation—notwithstanding the New Jersey decision referred to by Prof. Williston.

It is difficult to see how the decision in *Dingley v. Oler*, *supra*, can still be justified either as a matter of logic or in the view of the subsequent pronouncements by the same court and other courts. It is, the writer submits, settled law today (we have heretofore cited numerous cases to that effect) that a refusal to perform a contract except upon terms or conditions not embraced within and differing from the contract constitutes a repudiation of the contract. Yet *Dingley v. Oler*, *supra*, is still cited by the courts and sometimes followed. Nor can there be accepted the test laid down in *Vogt Mfg. Co. v. Sloss-Sheffield Steel & Iron Co.*, *supra*.

The real test must be whether a reasonable person would be warranted in inferring from the words used that the contract will not be carried out.¹¹⁰ A recent statement is to be found in *Monte Vista Farmers Co-op. Produce Co. v. Bemis Bag Co.*¹¹¹:

"Where one of the parties is guilty of conduct indicating that it repudiates its contract, the other party is entitled to treat the contract as rescinded and no longer binding upon it. The intention of the guilty party to that end, however, must be clear. * * * Rescission requires mutual assent, but assent may be inferred from conduct and circumstances, as well as from words."

The court was not dealing with technical rescission at all, but had before it an action to recover *damages* for an anticipatory breach, to which one of the defenses was that the contract had been cancelled. The opinion uses the word "rescission" in the sense of cancellation, which obviously would require mutual assent. The suggestion that the existence of an actionable repudiation is to be determined by the intention of the repudiator may likewise be misleading, unless there be added that his intention is to be judged solely by his words and conduct. The writer believes, however, that the aggrieved party is and certainly should be protected if his interpretation of such words and conduct is reasonable.

¹¹⁰See Williston on Contracts, vol. II, sec. 879, p. 1684; 22 Mich. L. Rev. 344.

¹¹¹294 Fed. (C. C. A., 8th Cir.) 8, 12 (1923).

Nor would the courts today follow the decision in *Johnstone v Milling*,¹¹² in which the promisor stated he could not get money enough to perform his promise and made this statement "constantly, in answer to the defendant's direct questions and at other times in conversation." It was nevertheless held that there was no actionable repudiation, Lord Esher, M. R., saying, that the test was, "Did he mean to say that *whatever* happened, whether he came into money or not, his intention was not to rebuild the premises as he had promised?"

The vice of this decision would appear obvious. A party to a contract is entitled not only to the willingness of the other party to perform, but he contracts for his ability to perform. If language is used by a party to a contract which reasonably and justifiably is construed by the other party to mean that the contract will not be performed, such language may well be regarded as a repudiation.

Of course, a mere request or offer to cancel or change the terms of a contract, does not constitute a repudiation.¹¹³ It is by no means the equivalent of an assertion, that if the cancellation be not assented or the desired change not agreed to, that the contract will not be performed upon its original terms. Whether the language does or does not constitute a repudiation is a matter to be decided, it seems to the writer, by rules of reason—by the standard of the interpretation which a reasonable man under the circumstances would place thereon.

IX. STATUTE OF LIMITATIONS

Only a few questions involving the statute of limitations can in the nature of things arise. Where there is a total rescission, and suit brought to recover the consideration paid or its value, the statute begins to run at once.¹¹⁴

The question has been raised as to when the statute begins to run in cases where the right of rescission has not been exercised. Does it begin to run from the date of repudiation or from the date fixed by the contract for performance? Although an anticipatory repudiation gives rise to the right to an immediate suit for damages, it is, as already discussed, not necessary that suit be then begun, but it may be brought after the time fixed for performance of the contract upon the theory that non-performance at that time is a breach.

¹¹²16 Q. B. D. 460 (1886).

¹¹³J. L. Metz Furniture Co. v. Thane Lumber Co., 298 Fed. (C. C. A., 8th Cir.) 91 (1924).

¹¹⁴Henry v. Rowell, 63 App. Div. (N. Y.) 620 (1901); 31 Misc. 384; McCurry v. Purgason, 170 N. C. 463 (1915).

The courts have held that if the action be brought after the contract period for performance, it is not barred by the statute, although commencement of the suit is delayed beyond the period of limitations if reckoned from the time of repudiation.¹¹⁵ In effect this was also decided in *Foss-Schneider Brewing Co. v. Bullock*.¹¹⁶

In the *GaNun* case,¹¹⁷ there was an agreement to leave plaintiff \$20,000 by will, in addition to paying her the sum of \$70 per month during her life. After the contract had run for two years, there was a breach. The action was brought after the death of the contracting party, which was more than six years subsequent to the original breach. It was held not to be barred by the statute. In effect this decision holds that the immediate action based upon the anticipatory breach is a different cause of action from that based on the non-performance at the contract time. The decision is criticized by Prof. Williston¹¹⁸ but it certainly has not been overruled. The theory that the causes of action are distinct seems, moreover, to have again had the express approval of the New York Court of Appeals.¹¹⁹ Except in most unusual cases, such as *GaNun v. Palmer*, it is not likely that any question of the Statute of Limitations will confront the practitioner.

X. DAMAGES

It has been urged¹²⁰ that recognition of the right to immediate right of action based upon anticipatory repudiation is attended with many difficulties in respect to applying correct rules of damages. The difficulties appear to the writer to have been exaggerated. If we refer to the classes of contracts in which this right of action has been recognized, it is obvious that there can exist no problems of difficulty confronting the practitioner where the repudiation was of a contract to marry or of a contract for personal services. The measure of damages in such cases is identical with the measure uniformly applied where the breach has taken place at the time of performance. Our discussion, therefore, will be confined to actions brought for repudiation of contracts of sale (including contracts to manufacture). In such actions likewise the general rule of damage is the same whether the repudiation be anticipatory or at the time fixed for performance.

¹¹⁵*GaNun v. Palmer*, 202 N. Y. 483 (1911).

¹¹⁶59 Fed. 83 (1893).

¹¹⁷*Supra*, n. 115.

¹¹⁸Williston on Contracts, vol. III, sec. 2027.

¹¹⁹*Winter v. American Aniline Products*, 236 N. Y. 199 (1923); *Henderson Tire & Rubber Co. v. Wilson & Co., Inc.*, 235 N. Y. 489, 499 (1923).

¹²⁰Prof. Williston, N. Y. L. J., June 21, 1924.

The difficulty is not with the rule or measure of damages so much as (1) with respect to the evidence to prove damages within such rule, and (2) the question of mitigation.

Ordinarily the damages to be recovered in actions based upon anticipatory repudiation, and whether brought by buyer or seller (and subject to mitigation of damages as hereinafter discussed) are the difference between the contract price and the market price at the place and *time fixed for performance* by the contract.¹²¹ It is to be emphasized that the contract price is to be compared with the market price at the time for performance, *not* the market price at the time of *breach*. In *Sedgwick on Damages*,¹²² the rule in cases of anticipatory repudiation is stated as follows:

"In England and most of the United States, the repudiation of a contract by one of the parties to it before the time for performance has arrived amounts to a tender of a breach of the contract; and if it is accepted as such by the other party, it constitutes a so-called 'anticipatory breach,' and the injured party is at liberty to begin suit at once and to recover entire damages. The damages are to be assessed, of course, as of the date of the breach; nevertheless, they are to be a compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time of the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract, rather than as a failure to perform it in its terms. The damage caused by such a premature destruction is, to be sure, due to the consequent failure to secure performance but this is a failure to secure performance according to its original terms, that is performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract, regarded as an article of property, the measure of damages is the value of such property at the time of its destruction, but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, the exact measure of damages upon an anticipatory breach is, in the ordinary case, precisely the same as it would be if the repudiation were not

¹²¹*Roehm v. Horst*, *supra*, n. 9; *United Press Ass'n. v. National Newspaper Ass'n.* 237 Fed. 547, 553 (1916); *Lagerloef Trading Co., Inc. v. American Paper Products Co.*, 291 Fed. 947 (1923); *Stetson & Post Lumber Co. v. Commercial Sash and Door Co.*, 299 Fed. 553 (1924); *Windmuller v. Pope*, 107 N. Y. 674 (1887); *Poel v. Brunswick-Balke Collander Co.*, 159 App. Div. (N. Y.) 365 (1913) (reversed on another point in 216 N. Y. 310); *Gentry Co. v. Margolius & Co.*, 110 Tenn. 669 (1903); *Brown v. Muller*, L. R. 7 Exch. (Eng.) 319 (1872); *Sedgwick on Damages* (9th ed.), sec. 636 (d).

¹²²*Supra*.

accepted as a breach, and the injured party brought suit, after the time of performance, for the non-performance at the time set. In other words, though plaintiff sues at once for an anticipatory breach of contract, his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance."

The statement that a repudiation is a "tender" of a breach and becomes a breach by "acceptance" at the hands of the injured party, has already been criticized by us as inaccurate and unsound in principle; but the doctrine as to damages stated by Mr. Sedgwick is in accord with the general trend of authority.

In *Roehm v. Horst*,¹²³ the rule, in cases of anticipatory repudiation, is stated in the following language:

"As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

In *United Press Association v. National Newspaper Association*,¹²⁴ the court said:

"There is no difference in the law as to the measure of recovery between anticipatory breaches before the time of the performance of the contract arrives and a refusal to further perform during the performance of a contract, except that the injured party may recover so far as he has performed. The law as to anticipatory breaches is well settled by *Roehm v. Horst*, 178 U. S. 1, 20, Sup. Ct. 780, 44 L. Ed. 953."

In recent cases this rule of damages has been reiterated.¹²⁵

In Great Britain, the rule is no different. In the leading case of *Brown v. Muller*¹²⁶, in which there was a contract for deliveries in September, October and November, Kelly, C. B., said:

"Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that

¹²³178 U. S. 1, 20 (1899); *supra*, n. 9, at p. 20.

¹²⁴*Supra*, n. at p. 553.

¹²⁵*Vogt Bros. Mfg. Co. v. Sloss-Sheffield Steel & Iron Co.*, 297 Fed. 54, 57 (1924) (action by seller); *Stetson & Post Lumber Co. v. Commercial Sash & Door Co.*, 299 Fed. 553 (1924) (an action by buyer); *Oklahoma Candy & Commission Co. v. Liquid Carbonic Co.*, Sup. Ct. of Okla., Sept. 9, 1924 (an action by buyer); and many other cases.

¹²⁶L. R. 7 Ex. 319 (1872); italics are the writer's.

month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. * * * Then, when the 31st of October arrives, the same state of things recurs as to the second installment of iron to be delivered; and again the damages will be the difference between the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

* * * * *

(p. 323) "The case of *Frost v. Knight* has been referred to as shewing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and *even although he had elected thus to treat the contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November.* The damages should therefore be assessed on the principle I have indicated."

The only difficulty with the application of this rule arises when the trial is reached *before* the time fixed for performance by the contract. Obviously, should the trial be reached *thereafter* the ascertainment of market value at the time for performance would create no difficulty. Where, however, the trial is reached before time for performance, there is introduced an element of uncertainty. How is a jury to determine at the time of trial what *will be* the market value at a *future* date? It would seem, however, that there is no greater uncertainty in this case than in estimating future profits or compensation for future pain and suffering. The courts undoubtedly would apply the principles laid down in *Wakeman v. Wheeler & Wilson Mfg. Co.*,¹²⁷ and *Delafield v. Armsby Co.*,¹²⁸ that mere uncertainty of amount does not prevent the award of damages where the breach has brought about a loss. The jury must do the best it can under the circumstances.

In a recent article in the Columbia Law Review,¹²⁹ it is suggested as follows:

"Where the case is tried before time for performance, it is clearly necessary to speculate as to a future market price,

¹²⁷101 N. Y. 205 (1886).

¹²⁸131 App. Div. 572, 582 (1909); Aff'd. 199 N. Y. 518.

¹²⁹Vol. 24, p. 55.

that at the time for delivery. As far as the problem is one of evidence, it would seem that evidence should be taken at the latest practical time in order to most accurately forecast the market price of the commodity at the time of delivery. This time might conceivably be the day before such evidence was actually submitted. It has been held that market quotations in reliable trade journals or market quotations of exchanges on which a commodity is bought and sold are good evidence of market value. (*Wilber v. Buckingham* (1911) 153 Ia. 194, 132 N. W. 960; *Chicago B. & Q. R. v. Todd* (1905) 74 Nebraska 712, 105 N. W. 83; see *Peschke v. Wright* (1916) 93 Misc. 154, 161, 156 N. Y. Supp. 773). Likewise it would seem that similar quotations for futures deliverable at the same date as that specified by the contract in question would be good evidence of the value of future performance. Such quotations could usually be obtained as late as the close of the market on the day previous to that on which they were to be submitted as evidence. There are some cases which apparently accept the latest good evidence available. (*Goldfarb v. Campe Corporation* (1917) 99 Misc. 475, 164 N. Y. Supp. 583; *Roper v. Johnson* (1873) L. R. 8 C. P. 167, 176.)"

Whatever difference of opinion may have existed in the past as to whether the contract price is to be compared with the market price at the time fixed for performance or with the price at the time of the repudiation, there can no longer be any such doubt on the proposition where the Sales Act is in force. Both in the case of the seller suing because of anticipatory repudiation by the buyer¹³⁰ and in the case of the buyer suing because of the anticipatory repudiation by the seller¹³¹ it is expressly provided that where there is an available market, and in the absence of special circumstances showing approximate damages of a greater amount, the measure is the difference between the contract price and the market price *at the time for performance* (or, if no time be fixed for performance, then at the time of repudiation).

A recent decision by the Circuit Court of Appeals¹³² at first blush may seem contrary to the general rules herein set forth and even to the statute. In that case the contracts required delivery in October, November, and December. On October 30th, a receiver of the defendant was appointed in the now familiar type of equity action. This receivership was held to constitute an anticipatory repudiation of the contract. The court below held,¹³³ as did the Circuit Court of Appeals, that the measure of damage in such case was the difference between the contract price and the market value *at the time of the*

¹³⁰N. Y. Pers. Prop. L., sec. 145, subdiv. 3.

¹³¹*Ibid.*, sec. 148, subdiv. 3.

¹³²*Samuels v. Drew & Co.*, 292 Fed. (C. C. A., 2d Cir.) 734 (1923).

¹³³286 Fed. 278.

appointment of the receiver, i. e., the time of the repudiation, and *not* the time of performance. The decision has been severely criticized.¹³⁴ While much of this criticism would appear to be well founded, it should be borne in mind that the decision was based both in the lower court and in the Circuit Court of Appeals upon the express ground that in view of the receivership the action was not an action in personam but an action *in rem*. Both Mack, C. J., said in the District Court, and Manton, C. J., writing the opinion for the Circuit Court of Appeals, assumed that in the ordinary action in personam the rule would have been different. They held, however, that in actions in rem and as a matter of convenience, claims should be provable against the estate only to the extent of the damages fixed by the market value at the time of the appointment of the receiver. Whatever we may think of the correctness of the decision—even in a receivership action—it is not at all in conflict with the rule that we have before discussed. As to the provisions of the Sales Act, Mack, C. J., said in that case¹³⁵:

“New York Sale of Goods Act (Consol. Laws, c. 41) § 145, is inapplicable. It regulates the right and the action in personam, not that in rem for participation in an insolvent estate.”

The general rule that the damages recoverable are the difference between the contract price and the market price at time for performance is subject to some exceptions. Where the seller sues because of repudiation by the buyer, and no market value is ascertainable owing to the goods being of special design or for other reasons, the measure of damages is the difference between the contract price and the cost of performance, i. e., the seller's loss of profits. This rule applies not only where the seller manufactures the goods, but likewise where he contracts to have the goods manufactured by others.¹³⁶ Where the buyer sues because of repudiation by the seller and no market price is ascertainable, the buyer's loss of profits is the proper measure for damages.¹³⁷

In the case of a buyer whose contract has been repudiated, Judge

¹³⁴24 Col. L. Rev. 56-58.

¹³⁵*Supra*, n. 133, at p. 280.

¹³⁶*Oswego Falls Pulp & Paper Co. v. Stecher Lithograph Co.*, 215 N. Y. 98 (1915); *Lieberman v. Templar Motor Co.*, 236 N. Y. 139 (1923), 149; *Hausman v. Buchman*, 189 App. Div. (N. Y.) 597, 602 (1919), and cases there cited; *Commos v. Pearson*, 190 App. Div. (N. Y.) 699, 702 (1920); *Pierson & Co., Inc. v. Nederlandsch-Indische, etc.*, 203 App. Div. (N. Y.) 365 (1922).

¹³⁷*Acunto v. Schmidt-Dauber Co., Inc.*, 207 App. Div. (N. Y.) 411 (1923).

McLaughlin¹³⁸ has classified the exceptions to the general rule of damages, as follows:

"(1) Where the article purchased is of a peculiar make or for a particular purpose, having either no market value or a value much greater to the purchaser than to the public generally; and (2) where the contract unfulfilled was to deliver goods which the seller knows are the subject of an agreement by his purchaser under the terms of which the latter must deliver these goods, for which he is to obtain an advance price. In such cases it is held that the purchaser's profit is contemplated by the parties in making the contract and that they should measure the damages caused by the breach of it."

Another exception arises where the seller sues, and the goods are not yet in a deliverable state. In such case the Sales Act provides:¹³⁹

"If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

This was also the law in the United States before the enactment of the Sales Act.¹⁴⁰ Of course, if damages are not enhanced by further performance, the seller may complete and the general rule of damages will then apply.¹⁴¹

We have already pointed out that the immediate suit, based upon anticipatory repudiation of a contract to buy or sell an article having a recognized market or an ascertainable market value, may introduce an element of uncertainty where the trial is reached before the time for performance has arrived. In practice, however, this situation is not apt to arise. If the breach be by the buyer, the damages may be liquidated by the seller. This was so at common law.¹⁴² Apparently

¹³⁸Atlas Portland Cement Co. v. Hopper, 116 App. Div. (N. Y.) 445, 449 (1900); approved in Acunto v. Schmidt-Dauber Co., Inc., *supra*.

¹³⁹N. Y. Pers. Prop. L., sec. 145, subdiv. 4: See Woolf v. Hamburger, 129 App. Div. (N. Y.) 883 (1909); Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528 (1912).

¹⁴⁰Williston on Sales (2d ed.), vol. II, sec. 589; see cases cited in note 93.

¹⁴¹*Ibid*; see cases cited in note 94.

¹⁴²Pollen v. Leroy, 30 N. Y. 549 (1863); Dustan v. McAndrew, 44 N. Y. 72 (1870); Moore v. Potter, 155 N. Y. 481, 490 (1898); see also General Electric Co. v. National Contracting Co., 178 N. Y. 369 (1904); Jardine v. Hueguet Silk Co., 203 N. Y. 273 (1911); Farrish Co. v. Harris Co., 122 Misc. 611 (1924).

the courts take the view that the Sale of Goods Act has created no change in this respect. It may, however, be noted that section 141 of the N. Y. Sales Act, entitled "When and How Resale may be Made," gives the right to resell,

- (a) Where the goods are of a perishable nature;
- (b) Where the seller expressly reserves the right of resale in case the buyer should make default; or
- (c) Where the buyer has been in default in the payment after a lapse of unreasonable time.

In any of such cases, by that section, an unpaid seller "having a right of lien or having stopped the goods in transitu" is authorized to resell. So far as has come to the writer's attention, it has always been held that the right of resale is *not* limited to the situations specified in Section 141 of the Sales Act, but the right of resale to liquidate damages has been recognized in *all* cases of breach by the buyer whether anticipatory or otherwise. This right of resale in a case of anticipatory repudiation by the buyer was recently considered in the Supreme Court of Oregon.¹⁴³ In that case the court below had charged the jury as follows:

"You are instructed as a matter of law that in an executory contract for the sale of sheep, if the buyer, after having made a contract, repudiates the contract, the seller has the right to go upon the open market and sell for the best possible price, the sheep in question, and if the money realized from the sale of the sheep is less than the contract price, then his measure of damages is the difference between the contract price and the amount actually received. In this respect, the seller must act in good faith, and he must sell for the best obtainable price. In other words, and simply stated, the measure of damages is the difference between the contract—if the plaintiff is entitled to prevail, and that is a question of fact for you to determine—between what he received upon the open market and what the contract states he should receive."

The Supreme Court of Oregon, in approving this instruction, stated:¹⁴⁴

"This instruction clearly states the law in this state. *Wigan v. LaFollett*, 84 Or. 488, 504, 505, 165 Pac. 579; *Daniels v. Morris*, 65 Or. 289, 297, 130 Pac. 397, 132 Pac. 958, 24 R. C. L. 109, S377; *Clews v. Jamison*, 182 U. S. 461, 21 S. Ct. 845, 45 U. S. (L. ed.) 1183; *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300; *Arkansas Etc. Grain Co. v. Young Etc. Grain Co.*, 79 Ark. 603, 96 S. W. 142, 116 S. R. 99, and note with authorities cited therein. *Mendel v. Miller*, 126 Ga. 834,

¹⁴³*Call v. Linn*, 228 Pac. 127 (1924).

¹⁴⁴At p. 131.

56 S. E. 88, 7 L. R. A. (N. S.) 1184. All of these authorities support this proposition."

MITIGATION OF DAMAGES

In the case of an anticipatory repudiation, as generally in all cases of breach of contract, it is the duty of the injured party to take reasonable steps to mitigate the damages. Where the breach is committed at the time of performance, and the article purchased has a market value, the rule of mitigation can have no application.¹⁴⁵ In such a case, if the breach be by the buyer, the seller is under no obligation to resell; nor, if the breach be by the seller, is the buyer under any obligation to buy from others.¹⁴⁶ The market price being determined at *the time of breach* controls irrespective of what the injured party may do.

Where there has been an anticipatory repudiation of a contract, the situation is somewhat different. In the case of repudiation by the buyer, as we have already shown, the seller may liquidate his damages by reselling. But, suppose he does not do so. Suppose he nevertheless *could* have resold prior to the time fixed for performance at a price equal to the contract price. It would seem on principle that under such circumstances he could have obviated all damages and consequently can recover only nominal damages. And similarly where there has been a repudiation by the seller and after such repudiation the buyer could secure the goods contracted for from others at a price not greater than the contract price, it would likewise seem on principle that the buyer can recover only nominal damages.¹⁴⁷

In a recent decision, the underlying principle of the duty to mitigate or avoid damages was clearly applied.¹⁴⁸ In that action the contract was to sell merchandise on credit. The plaintiff refused to deliver the goods unless buyer paid cash for them before delivery. The buyer showed that it had sufficient money on hand and had arranged to pay for the merchandise. The court stated in its opinion:

"The general rule and the rule provided by our statute is that the measure of damages for breach of a contract for sale of personal property is the difference between the contract price and the market price at time delivery should have been made.

"It is the duty of the buyer, however, to protect himself if

¹⁴⁵Saxe v. Penokee Lumber Co., 159 N. Y. 371 (1899).

¹⁴⁶*Ibid.*

¹⁴⁷The York-Draper Mercantile Co. v. Lusk, 6 Kan. App. 629 (1897); see also Williston on Sales (2d ed.), vol. II, sec. 588.

¹⁴⁸Okl. Candy & Commission Co. v. Liquid Carbonic Co., Sup. Ct., Okla., decided Sept. 9, 1924.

he can, and he will not be allowed to recover damages which could have been avoided. R. C. L. Vol. 24, p. 85; *Laurence et al. v. Porter et al.*, 63 Fed. 62, 11 C. C. A. 27; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117.

"In this case the defendant buyer could have had the car had it been willing to pay cash therefor, and it is in testimony by the president of the defendant that he had the money on hand or arranged for to take up the car on arrival. The purchase was made on a 30-day credit, and the only possible damage would have been nominal damages or the interest on the money for that period at 6% per annum."

In a still more recent decision by the same court, the duty to mitigate damages was carried a step further.¹⁴⁹ In that case defendant had agreed to furnish gas to plaintiff at \$25 per day for drilling a well, and then breached his contract by refusing to furnish the gas unless paid \$30 per day. The court held that it was incumbent on plaintiff to take the gas at the increased price, if no other could be procured, rather than to shut down his works because of inability to obtain the gas elsewhere, for such action would have reduced his damages to \$5 per day. The facts above outlined, of course, distinguish the case from the ordinary case of a sale of personal property, but none the less illustrate the tendency of the courts to insist upon mitigation of damages.

There is, however, another class of cases, viz., where the seller has repudiated and the buyer can make a new forward contract, but only in excess of the contract price; or where, the buyer having repudiated, the seller can sell, but only below the contract price. In England it has been held that where the repudiation has been "accepted as a breach" the injured party *must* make another contract with a third person if the "market was giving away" and "there was no reason to expect that prices would recover."¹⁵⁰ This is not the law in the United States. The writer agrees with Prof. Williston that there can, in the nature of things, be no duty upon the injured party to determine at his peril whether the market in the future will rise or fall.¹⁵¹

However, a decision just rendered by the Supreme Court of Michigan takes almost the same ground as the British cases.¹⁵² In that case the parties entered into a written contract on July 2, 1920, by which defendant purchased from plaintiff 400 pockets of rice at

¹⁴⁹*Key v. Kingwood Oil Co.*, Sup. Ct. Okla., decided October 14, 1924.

¹⁵⁰*Roth v. Taysen*, 73 L. T. 628 (1895); see also *Nickoll v. Ashton*, 2 Q. B. 298 (1900).

¹⁵¹Williston on Sales (2d ed.), vol. II, sec. 588.

¹⁵²*Goldsmith v. Stiglitz*, 200 N. W. 252 (1924).

the price of 10c per pound, to be shipped in October. Prior to October, defendant repudiated the contract. The rice came into plaintiff's control on October 10th, at which time the market price was 8c per lb. Plaintiff sold the rice later in the month for 6½c per lb. and this was likewise the market price on the last day of October—the last day upon which the contract might have been performed. The trial judge directed a verdict for plaintiff for an amount representing the difference between the contract price of 10c per lb. and 6½c per lb.—the price of resale—which, as stated, was likewise the market price on the last day of October. But the Supreme Court held this to be error, the opinion stating:¹⁵³

"The plaintiff was bound to minimize his loss. This is settled law. We have noted the fact the Blue Rose Rice matures later than Honduras Rice. There is no evidence in the case that there was a market for 'futures,' but plaintiff's testimony shows that the rice was within his control October 10, and that the market price was then about 8 cents and the market was falling. He sold the rice later in the month for 6½ cents, and this was the price on the last day of the month which was the last day of the contract. The trial judge, accepting this figure, directed a verdict for \$1400 and interest. In this he was in error. The market was falling, and this fact was well known to plaintiff. It was his duty to do what he could to save the loss. *Beebe v. Cullinane*, 214 Mich. 37. Under the testimony the question of the amount of damages plaintiff was entitled to recover was for the jury."

This opinion is not convincing. How was the plaintiff to know on October 10th that the market *would thereafter be* and continue to be lower? By this decision, the Supreme Court of Michigan held the plaintiff to an accuracy of prognostication which is beyond ordinary human experience. To make the aggrieved party at his peril determine the *future* course of market values seems to us illogical, dangerous, and unjust in the extreme.

While Prof. Williston agrees that there is no *duty* to make a new forward contract, he suggests¹⁵⁴ that the injured party is *entitled* to make a new contract where it is reasonable for *his own* protection, and that in such case damages are to be assessed on the basis of the cost of obtaining such new contract. The cases in which such action by the injured party has apparently been justified and held to furnish the measure of damages, are few and unconvincing. To give the in-

¹⁵³At p. 253.

¹⁵⁴Williston on Sales (2d ed.), vol. II, sec. 588. See also 24 Col. L. Rev. 57; *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587 (1916). See, however, *The York-Draper Mercantile Co. v. Lusk*, 6 Kan. App. 629 (1897).

jured party the power of making a new contract at a price which will not *obviate* the damages—"where such a course is reasonable"—would seem to add uncertainty to the law and not to furnish any ascertainable standard as to when that power may be exercised. It would seem to be the safer rule to place the right to make a new forward contract (as far as affecting the measure of damages) correlative with the obligation, viz., that such new contract should be made if it will obviate the damage resulting from the breach.

XI. SUMMARY OF THE LAW

Having now discussed the theories of text writers and of the authorities, it remains only to attempt to summarize the law of anticipatory repudiation as declared by the courts up to the time of writing. We shall in this summary confine ourselves to the law as laid down in the United States, without seeking to impress any views that may be entertained as to the correctness of any decision.

(a) In the case of anticipatory repudiation of a contract, further performance by the injured party is waived. He may desist from further performance because of such repudiation, and still will not be liable to suit by the repudiator.

(b) In addition to ceasing further performance, he may rescind the contract and recover the consideration with which he has parted, or its equivalent. If he wishes to rescind, he should serve formal notice upon the repudiator. In New York State it has been intimated that a suit would in itself be a sufficient notice of rescission and that further notice is unnecessary. The Sales Act, however, apparently requires such notice anterior to and separate and apart from the suit, and in no other state has it been held, so far as we are aware, that the notice may be dispensed with and that the institution of the suit itself is a sufficient compliance with the Sales Act.

(c) The injured party has an election between formal rescission and a suit for damages. The suit for damages may be brought by him after the time for performance has arrived without further performance or tender on his part.

(d) Where the breach has been either (1) of a contract to marry, or (2) for personal services, or (3) for the sale or purchase of personal property, an action for damages may be brought immediately, and without awaiting the time for performance. In New York State the right to bring such action has, up to the present time, been limited to the three classes of cases just outlined. In New Jersey and Wisconsin the right of action has also been recognized in the case of anticipatory repudiation of a contract of insurance. There

has been no final determination that such an action will not lie in the event of repudiation of other classes of contract; but in most jurisdictions it has been determined that the action will not lie in the case of breach of unilateral contracts or in the case of bilateral contracts where the repudiation is solely of a promise to pay money. It has not been definitely decided, but is doubtful whether such an action would lie for anticipatory repudiation of a contract to make a testamentary disposition. The above applies generally to all of the States except Massachusetts and Nebraska, which have declined to recognize the right to sue prior to the time for performance in *any* action. In jurisdictions where the right of immediate action is recognized, the action may be brought at any time prior to performance, and no right is waived or lost by delay.

(e) In such an action it is necessary to allege and prove that at the time of the repudiation the plaintiff was ready, able and willing to perform and would have so continued but for the defendant's repudiation, but it is not necessary to allege or prove tender of performance.

(f) It not being necessary in case of repudiation for the injured party to continue performance or to make a tender, the injured party loses no rights by urging a retraction of the repudiation; nor is any right lost even by a defective tender of performance, provided the injured party was ready, able and willing to perform at the time of the repudiation.

(g) Until suit be brought based upon the anticipatory repudiation, or the contract be formally rescinded, the repudiator has the right to retract the repudiation, in the absence of any principle of estoppel intervening.

(h) A repudiation, to be acted upon, must be positive, unequivocal and absolute. A mere request or offer to cancel or to change the terms of a contract does not constitute repudiation. On the other hand, the appointment of a receiver in bankruptcy or in equity constitutes such a repudiation, as do any other facts from which inability to perform follows as a necessary conclusion.

(i) Where there has been a total rescission, the statute of limitation begins to run at once against a suit to recover the consideration paid.

(j) The right of immediate action based upon anticipatory repudiation and the right of action after the contract period, based on non-performance, are regarded as separate and distinct causes of action so far as the statute of limitations is concerned. Accordingly, even though the action based upon anticipatory repudiation would be

barred by the statute of limitations, suit may still be brought after the time fixed for performance.

(*k*) The damages to be recovered in case of anticipatory repudiation are identical with those recoverable where the breach is at the time of performance. In the states where the Sales Act is in force, as well as at common law, such damages are ordinarily the difference between the contract price and the market price at the time and place of performance, not at the time of repudiation. This is so even should the trial be reached before the time fixed for performance. This rule of damages has been held by the United States Circuit Court of Appeals, Second Circuit, not to be applicable to claims against a defendant of whose property a receiver has been appointed in bankruptcy or in equity. In that circuit the measure of damage of such claims is held to be the difference between the contract price and the market price at the time of the appointment of the receiver.

(*l*) The ordinary measure of damages is subject to the same exceptions as apply where the breach is at the time of performance; such as the absence of ascertainable market value in which case the loss of profits is the proper measure of damages; or the existence of special facts showing that it was in the contemplation of the parties that the damages would be greater than the difference between contract price and market value.

(*m*) Where goods are not yet in a deliverable state, ordinarily the injured party will recover the profits which he would have made rather than the difference between the contract and market values. He may not enhance the damages by completion. However, if the damages are not enhanced by completion, the seller may complete and recover the difference between contract and market value.

(*n*) Where the breach is by the buyer, the damages may be liquidated by resale made by the seller exercising reasonable care.

(*o*) It is the duty of the injured party to obviate the damages, if possible. Consequently, where the injured party is the seller and can make a resale at the contract price or higher, he is entitled only to nominal damages. Conversely, if the injured party be the buyer and can replace at not in excess of the contract price, he is entitled only to nominal damages. However, where the injured party cannot obviate damages, he is generally in the United States held not to be obliged to make a new forward contract, and it is doubtful whether he can make such contract and hold the repudiator for the difference between the original and new contract prices, if market prices at the time for performance would not show any loss.